No. 08-1106

FILED
APR 9 - 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

ELLY GROSS, *et al.*,

Petitioners,

v.

THE GERMAN FOUNDATION INDUSTRIAL INITIATIVE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

LOUIS R. COHEN
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

ROGER M. WITTEN
Counsel of Record
MATTHEW E. DRAPER
WILMER CUTLER PICKERING HALE AND DORR LLP
399 Park Avenue
New York, NY 10022
(212) 230-8800

Counsel for Allianz SE, Bayer AG, Commerzbank AG, Evonik Degussa GmbH, Deutz AG and RAG AG

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

JOHN J. GIBBONS
TERRY MYERS
THOMAS R. VALEN
GIBBONS P.C.
One Gateway Center
Newark, NJ 07102-5310
Counsel for ThyssenKrupp AG

THOMAS M. MUELLER
MARK D. MCPHERSON
MORRISON & FOERSTER LLP
1290 Avenue of the Americas
New York, NY 10104-0050
Counsel for BASF SE

NEIL MCDONELL
BRIAN E. MCGUNIGLE
DEIRDRE SHERIDAN
DORSEY & WHITNEY LLP
250 Park Avenue
New York, NY 10177
Counsel for Robert Bosch GmbH

JEFFREY BARIST
SANDER BAK
FELIX WEINACHT
MILBANK, TWEED, HADLEY & MCCLOY LLP
1 Chase Manhattan Plaza
New York, NY 10005
Counsel for Deutsche Bank AG and Dresdner Bank AG

DANIEL V. GSOVSKI
IAN CERESNEY
HERZFELD & RUBIN, P.C.
40 Wall Street
New York, NY 10005
Counsel for Volkswagen AG

KONRAD L. CAILTEUX
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153-0119
Counsel for Bayerische Motoren Werke AG

BUD G. HOLMAN
PAUL DOYLE (OF COUNSEL)
KELLEY DRYE & WARREN LLP
101 Park Avenue
New York, NY 10178
Counsel for Daimler AG

BRANT W. BISHOP, P.C.
KIRKLAND & ELLIS LLP
655 15th Street, NW
Washington, DC 20005
Counsel for Siemens AG

QUESTIONS PRESENTED

Petitioners' Questions Presented assume and incorporate some of their hoped-for answers. A fairer statement of their questions would be:

1. Whether the court of appeals' decision is contrary to *American Insurance Ass'n* v. *Garamendi*, 539 U.S. 396 (2003), or any other decision of this Court or any court of appeals.

2. Whether the court of appeals' determination that the "Joint Statement" does not create any obligation enforceable in United States courts is inconsistent with *Medellín* v. *Texas*, 128 S. Ct. 1346 (2008).

3. Whether, even if the Joint Statement did not create obligations enforceable in United States courts, petitioners' and respondents' actions consistent with the Joint Statement gave rise to an enforceable promissory estoppel.

PARTIES TO THE PROCEEDINGS

The correct name of the first-listed respondent is "German Economy Foundation Initiative" ("GEFI" or the "Initiative"). GEFI is an informal group of German companies and is not a legal entity. The other respondents in this Court, defendant-appellees below, are Allianz SE; BASF SE; Bayer AG; Bayerische Motoren Werke AG; Commerzbank AG; DaimlerChrysler AG (now known as Daimler AG); Deutz AG; Deutsche Bank AG; Dresdner Bank AG; Degussa AG (now known as Evonik Degussa GmbH); RAG AG; Robert Bosch GmbH; Siemens AG; ThyssenKrupp AG (successor by merger to, and sued herein as, Fried. Krupp AG, Hoesch-Krupp); and Volkswagen AG.

Respondents dispute petitioners' argumentative descriptions (Pet. ii) of the actions and relationships of the parties.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, respondents state as follows:

Respondent Allianz SE has no parent corporation, and no publicly held company owns 10% or more of its stock;

Respondent BASF SE has no parent corporation, and no publicly held company owns 10% or more of its stock;

Respondent Bayer AG has no parent corporation, and no publicly held company owns 10% or more of its stock;

Respondent Bayerische Motoren Werke AG has no parent corporation, and no publicly held company owns 10% or more of its stock;

Respondent Commerzbank AG has no parent corporation. Allianz SE is a publicly held company that owns 10% or more of its stock;

Respondent DaimlerChrysler AG, now known as Daimler AG, has no parent corporation, and no publicly held company owns 10% or more of its stock;

Respondent Deutz AG has no parent corporation. Same Deutz-Fahr Holding & Finance BV is a publicly held company that owns 10% or more of its stock;

Respondent Deutsche Bank AG has no parent corporation, and no publicly held company owns 10% or more of its stock;

Respondent Dresdner Bank AG's parent corporation is Commerzbank AG. Commerzbank AG, a publicly held company, owns 100% of the voting stock of Dresdner Bank AG;

Respondent Degussa AG, now known as Evonik Degussa GmbH, is a wholly owned subsidiary of Evonik Industries AG ("Evonik"). Evonik is owned by RAG Stiftung and Clear Vision Capital Fund Sicav-Fis S.A. ("CVC"). CVC consists of privately owned advisory entities that provide investment advice to and/or manage investments on behalf of investment funds. No publicly held company owns 10% or more of Evonik Degussa GmbH's stock;

Respondent RAG AG's parent corporation is RAG Stiftung, and no publicly held company owns 10% or more of its stock;

Respondent Robert Bosch GmbH's parent corporations are Robert Bosch Stiftung GmbH and Respondent Robert Bosch Industrietreuhand KG, and no publicly held company owns 10% or more of their stock;

Respondent Siemens AG has no parent corporation, and no publicly held company owns 10% or more of its stock;

Respondent ThyssenKrupp AG as successor by merger to, and sued herein as, defendant Fried. Krupp AG, Hoesch-Krupp has no parent corporation, and no publicly held company owns 10% or more of its stock;

Respondent Volkswagen AG has no parent corporation, and Porsche Automobil Holding SE holds more than 10% of Volkswagen AG stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

RULE 29.6 STATEMENT iii

TABLE OF AUTHORITIES vii

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. The Berlin Accords 4

B. Events Leading To The Present Dispute 8

C. Proceedings Below 10

ARGUMENT 19

I. THE DECISION BELOW DOES NOT CONFLICT WITH *AMERICAN INSURANCE ASS'N* V. *GARAMENDI* OR ANY OTHER DECISION OF THIS COURT OR ANY COURT OF APPEALS 19

II. PETITIONERS' VARIOUS ARGUMENTS ON THE MERITS OF THE ENFORCEABILITY ISSUE FURTHER ILLUSTRATE WHY THE CASE DOES NOT WARRANT REVIEW 22

III. DENIAL OF THE PETITION WILL WORK NO INJUSTICE 26

TABLE OF CONTENTS—Continued

Page

IV. CERTIORARI SHOULD BE DENIED IN *SCHWARTZ LEE* 27

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

Page(s)

American Insurance Ass'n v. *Garamendi*, 539 U.S. 396 (2003) ..... i, 5, 19, 20, 21

Asakura v. *City of Seattle*, 265 U.S. 332 (1924) 25

Bacardi Corp. of America v. *Domenech*, 311 U.S. 150 (1940) 24

Burger-Fischer v. *Degussa AG*, 65 F. Supp. 2d 248 (D.N.J. 1999) 5

Clark v. *Allen*, 331 U.S. 503 (1947) 24

De Geofroy v. *Riggs*, 133 U.S. 258 (1890) 25

Deutsch v. *Turner Corp.*, 324 F.3d 692 (9th Cir. 2003) 10

Frumkin v. *J.A. Jones, Inc. (In re Nazi Era Cases Against German Defendants Litigation)*, 129 F. Supp. 2d 370 (D.N.J. 2001) 21, 22

Gross v. *German Foundation Industrial Initiative*, 320 F. Supp. 2d 235 (D.N.J. 2004) 1, 12, 26

Gross v. *German Foundation Industrial Initiative*, 456 F.3d 363 (3d Cir. 2006) 9, 10, 12, 23

In re Austrian & German Bank Holocaust Litigation, No. 98 Civ. 3938, 2001 WL 228107 (S.D.N.Y. Mar. 8, 2001) 10

In re Nazi Era Cases Against German Defendants Litigation, 198 F.R.D. 429 (D.N.J. 2000) 5, 14

In re Nazi Era Cases Against German Defendants Litig., 213 F. Supp. 2d 439 (D.N.J. 2002) 14

TABLE OF AUTHORITIES—Continued

Page(s)

Iwanowa v. *Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999) 5

Kolovrat v. *Oregon*, 366 U.S. 187 (1961) 24

Maiorano v. *Baltimore & Ohio Railroad Co.*, 213 U.S. 268 (1909) 25

Martin v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) 25

Medellín v. *Texas*, 128 S. Ct. 1346 (2008) ..... i, 18, 24

Olympic Airways v. *Husain*, 540 U.S. 644 (2004) 24

Société Nationale Industriale Aérospatiale v. *United States District Court*, 482 U.S. 522 (1987) 25

Sumitomo Shoji America, Inc. v. *Avagliano*, 457 U.S. 176 (1982) 24

Tel-Oren v. *Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) 19

Trans World Airlines, Inc. v. *Franklin Mint Corp.*, 466 U.S. 243 (1984) 24

United States v. *Alvarez-Machain*, 504 U.S. 655 (1992) 16

Ware v. *Hylton*, 3 U.S. (3 Dall.) 199 (1796) 25

Winters v. *Assicurazioni Generali S.p.A.*, Nos. 98 Civ. 9186, 97 Civ. 2262, 2000 U.S. Dist. LEXIS 18193 (S.D.N.Y Dec. 19, 2000) 9, 21, 22

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES AND RULES

28 U.S.C.
§ 1254 1
§ 1331 1
§ 1332 1

Federal Rules of Civil Procedure
Rule 12 3
Rule 23 ..... 3, 18
Rule 60 ..... 9, 14, 18, 25

OTHER AUTHORITIES

Bettauer, Ronald J., *Keynote Address—The Role of the United States Government in Recent Holocaust Claims Resolution*, 20 Berkeley J. Int'l L. 1 (2002) 23

Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555 (1970) 25

IN THE

Supreme Court of the United States

No. 08-1106

ELLY GROSS, *et al.*,

Petitioners,

v.

THE GERMAN FOUNDATION INDUSTRIAL INITIATIVE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. § 1254(1).

Petitioners state (Pet. 5 n.6) that the district court's subject matter jurisdiction was "invoked in the lower courts under 28 U.S.C. § 1332(a)(2) ... and ... § 1331." The district court rejected Section 1331 jurisdiction because petitioners have not made any claim arising under federal law, *Gross* v. *German Foundation Industrial Initiative*, 320 F. Supp. 2d 235, 239 (D.N.J. 2004), and petitioners did not appeal this ruling. *See* Pet. App. 11.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

This case does not involve any provision of the Constitution, any treaty, or any U.S. federal or state statute, ordinance, or regulation. It does involve a statute enacted by the legislature of the Federal Republic of Germany on August 12, 2000 (the "Foundation Law"), which does not appear in the appendix to the petition and is set forth in the appendix to this brief.

Three pertinent documents are set forth at Pet. App. 224-254: (1) the "Joint Statement on occasion of the final plenary meeting concluding international talks on the preparation of the Foundation 'Remembrance, Responsibility, and the Future,' " signed in Berlin on July 17, 2000, by, among others, eight Nations, representatives of certain claimants, and GEFI (the "Joint Statement"); (2) the "Executive Agreement Between the Government of the United States of America and the Federal Republic of Germany Concerning the Foundation 'Remembrance, Responsibility, and the Future,' " signed in Berlin on July 17, 2000 (the "Executive Agreement"); and (3) a letter from the United States Embassy in Berlin to Germany's Federal Foreign Office, dated October 19, 2000, confirming that the United States considers the Foundation Law, as clarified and interpreted, to be fully consistent with the Executive Agreement.

STATEMENT OF THE CASE

This case arises out of an international "diplomatic achievement" (Pet. App. 41) in 2000—the "Berlin Accords"—that by all accounts was "unique" (e.g., *id.* at 14, 71, 72, 73, 162). The decision below rests entirely on the specific wording, circumstances, and history of the documents comprising the Berlin Accords. The deci-

sion below did not resolve any question of federal law as none was presented. *See id.* at 11 n.2. Nor is it inconsistent with any decision of this Court or of any other court of appeals.

While some of history's most tragic events form the historical backdrop, the case itself lacks broad legal significance. In the 1990s, petitioners filed putative class actions seeking compensation for, *inter alia*, forced and slave labor for German companies during the Nazi period and World War II. These claims were not settled pursuant to Fed. R. Civ. P. 23. Some were involuntarily dismissed pursuant to Fed. R. Civ. P. 12(b)(6), while others were voluntarily dismissed as one step in international arrangements that also included Germany's creation of a German Foundation (as a sovereign instrumentality of the Federal Republic of Germany) to make specified payments (*see, e.g.*, Pet. 15 n.15) to Nazi victims as well as "fund ongoing projects to prevent religious and ethnic intolerance in Germany." Pet. App. 42. Petitioners do not assert that any payment promised to a Nazi victim was not made, but only that under Paragraph 4(d) of the Joint Statement German companies that had voluntarily contributed DM 5.1 billion (about $2.5 billion) in principal and interest to the Foundation owed additional interest to the Foundation. The Foundation and the German Government have concluded that no such interest was owing. *See* CAJA 351-354.

The decision below was correct, will result in no injustice to any petitioners, and does not present a recurring issue. The district court dismissed the claims, ruling that (1) the Joint Statement did not create obligations enforceable in U.S. courts, and (2) in any event, the Joint Statement did not call for any payment from defendants that has not been made. The court of ap-

peals affirmed on the first ground without reaching the second. The text of the Joint Statement and its history and context make clear that it was a statement of intentions, not a contract enforceable in the United States. German companies of course intended to collect and pay over to the Foundation the amounts specified—and they did. And there was abundant recourse against them if they had not. *See* pp. 17-18, *infra*. But it was the very essence of the arrangement that the German Government and a sovereign German Foundation would take responsibility for making "dignified payments" to Nazi-era victims and that claims for redress of any kind would be cognizable only in Germany and not in a U.S. court.

The district court's second ground for dismissal, not reached by the Third Circuit, was also correct: petitioners' various and inconsistent readings of the "interest" provision of the Joint Statement are without merit. As Judge Debevoise recognized, the whole history of the Joint Statement "support[s] [respondents'] account of what the German companies owe by way of interest and demolish[es] the scenario that, with considerable ingenuity, [petitioners] have created." Pet. App. 205.

A. The Berlin Accords

In March 1998, *Gross* petitioners' counsel filed a claim in the District Court for the District of New Jersey seeking "redress for the widespread use of slave labor by German industry during the Nazi period." Pet. App. 47. This filing was among "more than 60 additional cases throughout the United States." *Id.* In August 1998, twelve German companies (later joined by five others) that are respondents here formed GEFI, whose mission (as described by the district court (*id.* at 47)) was "to obtain all-embracing and enduring

legal peace for German companies by establishing and funding a German Foundation for making payments to certain victims of the National Socialist era and World War II that would be an instrumentality of the Federal Republic of Germany, governed by German institutions and not subject to oversight or review by United States courts."

The claims for redress had little prospect of being litigated successfully. For over 60 years the governments of Germany, the United States, and other countries have addressed such claims exclusively through diplomatic and intergovernmental means, and U.S. courts have uniformly dismissed such cases on various grounds. *See, e.g., Burger-Fischer* v. *Degussa AG*, 65 F. Supp. 2d 248 (D.N.J. 1999); *Iwanowa* v. *Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999); *In re Nazi Era Cases Against German Defendants Litig.*, 198 F.R.D. 429 (D.N.J. 2000); *see also American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396 (2003).

Although GEFI's mission included seeking "legal peace" for German companies, "GEFI rejected the use of Rule 23, refusing to accept continued involvement of the United States courts and insisting that the institutions established to provide recompense had to be German and not subject to American oversight." Pet. App. 49. Accordingly, all of the cases were voluntarily or involuntarily dismissed as a result of the Berlin Accords.

The Berlin Accords consist of three related documents: (1) the "Executive Agreement between the United States and Germany," signed in Berlin, Germany, on July 17, 2000; (2) the "Joint Statement on occasion of the final plenary meeting concluding international talks on the preparation of the Foundation 'Re-

membrance, Responsibility, and the Future,'" also signed in Berlin on July 17, 2000, by, among others, eight Nations, representatives of certain claimants, and GEFI; and (3) the Foundation Law, enacted by the German Bundestag on August 12, 2000.

(1) The Executive Agreement between the United States and Germany provided that Germany would enact the Foundation Law and described both the Law and the Foundation in detail. Pet. App. 236-237, 239-247. The Agreement stated that the Foundation would make "payments ... [to] those who suffered at the hands of German companies during the National Socialist era" and would also "support projects that ... serve to promote understanding between nations [and other humanitarian goals]." *Id.* at 239. The Agreement further provided that the Foundation would be subject to "supervision by a German governmental authority" to which "any person" could apply to assure compliance. *Id.* at 236.

The Executive Agreement also recognized as "legitimate" the interest of German companies, the United States, and Germany in "all embracing and enduring legal peace" with respect to Nazi-era claims. Pet. App. 234-235, 237. It stated that it was in the interests of both the United States and Germany "for the Foundation to be the exclusive remedy and forum" for the resolution of all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II. *Id.* at 237. To that end, the United States agreed (*id.*) that it would file Statements of Interest, described in Annex B to the Agreement (*id.* at 247-251), supporting dismissal of all pending and any future-filed cases against German companies arising out of the Nazi era and World War II.

(2) The Joint Statement stated that the German Government would "ma[ke] available to the Foundation" DM 5 billion in two tranches on October 31, 2000 and December 31, 2000.[1] Pet. App. 229. It stated that German companies would make a separate DM 5 billion contribution "once all lawsuits against German companies arising out of the National Socialist era and World War II pending in U.S. courts ... are finally dismissed with prejudice by the courts." *Id.* at 228-229. It described the total of these amounts, DM 10 billion, as "both a ceiling and the final amount." *Id.* at 226.

The Joint Statement "[a]ccept[ed] the common objective that German companies ... receive all embracing and enduring legal peace." Pet. App. 226. It stated that the nineteen signatories who were counsel to plaintiffs in pending cases "will file motions or stipulations to dismiss with prejudice all lawsuits they have filed currently pending in U.S. courts against German companies arising out of the National Socialist era and World War II." *Id.* at 230. "[P]laintiffs' lawyers agreed to dismiss with prejudice the numerous pending litigations, so that the victims would receive payment through the Foundation rather than civil actions and that the German companies would achieve 'all-embracing and enduring legal peace.' " *Id.* at 7. The Joint Statement also confirmed that the establishment of the Foundation "does not create a basis for claims against the Federal Republic of Germany or its nationals" (a term defined to include German companies). Pet. App. 227.

---

[1] At the time, two German Deutschmarks were worth approximately $1.00.

(3) The Foundation Law enacted by the German Bundestag "establishe[d] the Foundation as the legal entity for processing claims and distributing the DM 10 billion fund." Pet. App. 9. The Law named the Foundation "Remembrance, Responsibility and the Future" (*see* App. 2a), provided for its governance, and committed its oversight to the German Federal Ministries of Foreign Affairs and Finance. App. 7a. The Law provided that German companies and the German Government would each make available DM 5 billion to the Foundation, and that "[t]here is no obligation for the donors to make supplementary payments." App. 3a. The Law confirmed that the German companies' payment would be made only after they received "adequate legal security." App. 22a. The Law also provided for the allocation of the Foundation's resources to Nazi-era victims and for other purposes in amounts adding up to DM 10.1 billion, of which DM 100 million was described as coming from "interest." App. 8a, 11a.

On October 19, 2000, the United States and Germany exchanged diplomatic Notes acknowledging that the Foundation Law "is fully consistent with Annex A to the [Executive] Agreement" and thus brought that Agreement into force on that date. Pet. App. 253.

B. Events Leading To The Present Dispute

After the Berlin Accords were in place, GEFI continued its efforts to raise DM 5 billion in voluntary contributions from German companies. On a parallel track, the plaintiffs' lawyers who were signatories to the Joint Statement cooperated in seeking consolidation of the pending cases against German companies—a step that would facilitate voluntary dismissal of those cases. On August 4, 2000, the Judicial Panel on Multidistrict Litigation ("JPML") consolidated the pending federal dis-

trict court cases before Judges Bassler (D.N.J.), Mukasey (S.D.N.Y), and Kram (S.D.N.Y.).

The plaintiffs in the cases before Judge Bassler moved to dismiss voluntarily but—because those proceedings were occurring before German companies had finished raising the required amount and before German companies were due to transfer DM 5.1 billion to the Foundation—plaintiffs' counsel expressed concern that after the dismissals the Foundation might not receive its full funding. *Gross* v. *German Found. Indus. Initiative*, 456 F.3d 363, 370 (3d Cir. 2006). At plaintiffs' request, Judge Bassler included in each Order of Dismissal a provision stating that in the event of a funding shortfall, Fed. R. Civ. P. 60(b) would allow the judgments dismissing the cases to be vacated so that plaintiffs could pursue their claims. Judge Mukasey did the same.[2]

Judge Kram, however, repeatedly denied the plaintiffs' voluntary motions to dismiss the cases before her. Ultimately, on May 17, 2001, the Court of Appeals for the Second Circuit granted a writ of mandamus, compelling Judge Kram to dismiss the cases before her, and she complied on May 18 and 21, 2001.[3]

---

[2] *See Winters* v. *Assicurazioni Generali S.p.A.*, Nos. 98 Civ. 9186, 97 Civ. 2262, 2000 U.S. Dist. LEXIS 18193 (S.D.N.Y. Dec. 8, 2000).

[3] Petitioners assert (at 7) that the participants in the Berlin Accords anticipated a six-month period between the signings on July 17, 2000, and the dismissal of all cases, and that Judge Kram's refusal to dismiss caused an "unexpected" delay. There is no record support for this hypothesis, and both halves of it are demonstrably wrong. On July 17, Germany had yet to enact the Foundation Law, more than 60 cases were pending in both federal and

Following the dismissals, "[o]n May 30, 2001, the German legislature declared 'legal peace,' triggering the obligations of ... the German companies to ... pay DM 5 billion to the Foundation." Pet. App. 9.[4] GEFI then undisputedly did cause the "transfer[] [of] DM 5.1 billion, which included DM 100 million as the 'interest' designated in Paragraph 4(d) of the Joint Statement." *Id.*

C. Proceedings Below

1. The last sentence of Paragraph 4(d) of the Joint Statement (Pet. App. 229) states:

---

state courts (some brought by lawyers who were not participants in the Joint Statement) (CAJA 260-288, Annexes to the Joint Statement listing cases), and the JPML had yet to act (or schedule a hearing) on motions to consolidate the cases pending in federal courts. *See* JPML Transfer Order 2, Dkt. No. 1337 (Aug. 4, 2000). But Judge Kram's special master had informed the parties two months earlier, on May 17, 2000, that Judge Kram would refuse to grant plaintiffs' anticipated motions to dismiss unless the Berlin Accords, then not yet signed, provided for additional payments in respect of certain claims in parallel but unrelated Austrian cases pending before her. *Gross* v. *German Found. Indus. Initiative*, 456 F.3d at 370 (citing *In re Austrian & German Bank Holocaust Litig.*, No. 98 Civ. 3938, 2001 WL 228107 (S.D.N.Y. Mar. 8, 2001)). The present petitioners' counsel were counsel in the proceedings before Judge Kram, and their assertion (Pet. 8) that her refusal to dismiss was "unexpected" is unfounded.

[4] Plaintiffs in thirteen cases had refused to dismiss their claims voluntarily (CAJA 284-288, Annex D to the Joint Statement), and some were not dismissed by the time the German Bundestag nevertheless declared "adequate legal peace" and German company payments to the Foundation began. Protracted appeals occurred in at least one case, *Deutsch* v. *Turner Corp.*, 324 F.3d 692 (9th Cir.), *cert. denied*, 124 S. Ct. 105 (2003).

> German company funds will continue to be collected on a schedule and in a manner that will ensure that the interest earned thereon before and after their delivery to the Foundation will reach at least 100 million DM.

There is no dispute that GEFI delivered to the Foundation DM 5 billion plus DM 100 million in interest. Pet. App. 9. Nor is there any dispute that after delivery of the funds to the Foundation, they earned much more than DM 100 million in interest. CAJA 302.

2. Two different sets of plaintiffs, however, filed suit alleging (on quite different and inconsistent theories) that German companies owed a larger amount of interest. Pet. App. 9-10. The *Gross* plaintiffs filed a complaint in the District of New Jersey in June 2002, alleging that they were third-party beneficiaries of the Joint Statement and that the sentence quoted above imposed a contractual obligation on German companies to pay interest on DM 5 billion from July 17, 2000, the day the Joint Statement was signed, to the date of payment. *Id.* While petitioners' theory meandered during the course of the proceedings, as the claim is now articulated they assert an obligation to pay interest at 4%, allegedly the "going rate" in Germany. *See* Pet. 33. The *Schwartz Lee* plaintiffs filed a complaint in the same court in July 2003, naming respondents Deutsche Bank AG and Dresdner Bank AG and alleging that the interest obligation started seven months before the Joint Statement was signed, on December 14, 1999. Pet. App. 9-10. The *Schwartz Lee* claim was not based on Paragraph 4(d) of the Joint Statement but on an alleged oral agreement on December 14, 1999, that plaintiffs had teased out of a description of negotiation events that the district court found stunningly incomplete (*id.* at 105, 184-187). (It is not clear from the

Petition whether the *Gross* and *Schwartz Lee* petitioners continue to have inconsistent views of respondents' alleged obligation.)

3. Respondents moved to dismiss, contending, *inter alia*, that the cases were not "justiciable" and that no further interest was owed under either of petitioners' theories. Judge Bassler dismissed the cases as nonjusticiable, *Gross* v. *German Found. Indus. Initiative*, 320 F. Supp. 2d 235 (D.N.J. 2004) ("*Gross I*"), but the Third Circuit reversed, holding that there was no such constitutional obstacle to deciding the claims, *Gross* v. *German Found. Indus. Initiative*, 456 F.3d 363 (3d Cir. 2006) ("*Gross II*"). The court of appeals posed two questions to be considered by the district court on remand:

> (1) is the Joint Statement, or part of the Joint Statement, enforceable as a private contract, and (2) if so, what "interest" obligation, if any, did the parties intend for the German Foundation Industrial Initiative?

Gross II, 456 F.3d at 387.

4. On remand, the cases were assigned to Judge Debevoise (Judge Bassler had retired). He considered both questions and in a comprehensive opinion ruled against petitioners on both grounds, either of which would be sufficient to require dismissal of their claims.

First, Judge Debevoise ruled that the "Joint Statement is a political document that does not confer upon the signatories, or any portion of them, contractual rights which can be enforced in United States courts." Pet. App. 45. His analysis focused both on general features of the Joint Statement and the other Berlin Ac-

cord documents, and on specific Joint Statement language. *Id.* at 160-172.

Judge Debevoise noted that the Joint Statement had been signed by eight sovereign nations as well as private parties, and that there is a general rule that international documents, even when they are agreements, do not create private rights of action. Pet. App. 166. He added, "The Joint Statement does not contain an explicit statement that it is privately enforceable.... The phrases of the Joint Statement that might be deemed to refer to future litigation rejected that possibility.... The Joint Statement contains none of the provisions that usually accompany an agreement that contemplates legal action to enforce the agreement, such as disputes clauses, choice of forum clauses, or choice of law clauses." *Id.* at 167-168. He noted that, consistent with this point, the Joint Statement was signed by officials *not* authorized to bind the United States and Germany (*id.* at 168), and that in this respect the Joint Statement contrasted with the Executive Agreement, which was signed the same day and place by the U.S. and German governments, by officials authorized to bind their respective countries (*id.*).

Judge Debevoise made a close analysis of the words of the Joint Statement. He noted, citing diplomatic precedents and international legal authority, that, as a matter of international practice, "[t]he very title of the instrument—Joint *Statement*—negates the creation of a legally binding agreement." Pet. App. 168 (emphasis in original). Judge Debevoise correctly observed that the designation "joint statement" is consistently applied to documents that "summarize a conference and express mutual intentions but do not establish legal obligations enforceable in any domestic court." *Id.* He pointed out that the Joint Statement refers to its signa-

tories as "participants" and never as "parties" (*id.* at 169); that throughout the document the participants "declare," rather than "undertake" or "agree" (*id.*). On this point he again drew a contrast with the Executive Agreement, signed the same day and place, which "is replete with language of 'agreement' from its title to constant use of the terms 'parties,' 'agree,' and 'agreed.'" *Id.*

Responding to petitioners' argument that the Joint Statement nevertheless contains a private contract enforceable against respondents, Judge Debevoise said: "In all this [Joint Statement language], there is nothing to suggest that the private lawyer signatories can extract from the comprehensive Joint Statement selected provisions for judicial enforcement." Pet. App. 169.

He also rejected petitioners' argument that the Joint Statement must be enforceable as a private contract or otherwise German companies could have accepted the benefits of dismissal and walked away from funding the Foundation. Reciting the history and provisions of the Berlin Accords, he said that "all the claimant participants relied on the power and persuasiveness of the United States and German Governments ... to ensure that any agreement arrived at would be adhered to." Pet. App. 170. (He did not need to note that, in the event of a funding shortfall, plaintiffs had the right to move to reopen their cases because the "agreed upon solution was to make all of the Court's dismissal orders expressly subject to Fed.R.Civ.P. 60(b)." *In re Nazi Era Cases Against German Defendants Litig.*, 213 F. Supp. 2d 439, 445 (D.N.J. 2002); *see In re Nazi Era Cases Against German Defendants Litig.*, 198 F.R.D. 429, 446-447 (D.N.J. 2000).)

Second, Judge Debevoise ruled that, if the Joint Statement were enforceable and the interest question were properly before him, he would grant summary judgment for respondents because "undisputed Declarations and the vast amount of documentary evidence" demonstrate that defendants had fulfilled all payment commitments to the Foundation. Pet. App. 205. He said the evidence "support[s] Defendants' account of what the German companies owe by way of interest and demolish[es] the scenario that, with considerable ingenuity, Plaintiffs have created." *Id.*

Judge Debevoise described (Pet. App. 178-205) the negotiating history of the "interest" sentence that had been set forth in declarations of Otto Graf Lambsdorff, the lead negotiator for Germany, and others, noting that "[t]here is no evidence whatsoever to contradict these declarations." *Id.* at 194. In particular, Judge Debevoise took note of the book and the declaration written by former Deputy Secretary of the Treasury Stuart Eizenstat, on which petitioners relied below as they do in this Court, and found that "[a]s far as it goes, [Mr. Eizenstat's] book is totally consistent with Defendants' view of the case." *Id.* at 200.

Judge Debevoise further found that in the negotiations Mr. Eizenstat, representing the United States, did make a series of *proposals* for interest to be paid on German company funds, including specific trigger dates for interest and proposals that the DM 5 billion be treated as a "present value," but each such proposal was firmly rejected by the German side, a fact Mr. Eizenstat nowhere disputes. *See* Pet. App. 195-205.

5. Both the *Gross* and the *Schwartz Lee* plaintiffs appealed, and the Third Circuit affirmed on the ground that "the disputed interest provision of the Joint

Statement does not constitute or confer a privately enforceable cause of action on the [petitioners] .... Because we agree with Judge Debevoise's rationale, we adopt it as ours, with some minor points as described herein." Pet. App. 5-6.

The court of appeals stated that "the law of international agreements provides the appropriate jurisprudential guidance in the analysis of whether the Joint Statement creates a private cause of action." Pet. App. 14. While acknowledging that "one objective was to settle then-pending U.S. litigation," it said that the Berlin Accords had "political, diplomatic and historical significance" and that senior officials of both the United States and Germany had been directly and intensively involved in negotiating it. *Id.* at 13-14. The court stated: "In sum, the Joint Statement appears to be a unique document, the objectives of which are to memorialize the efforts of the diplomatic talks resolving both political and legal issues." *Id.* at 14.

As was proper, the court of appeals looked first to the text of the Joint Statement (Pet. App. 15 (citing *United States* v. *Alvarez-Machain*, 504 U.S. 655, 663 (1992))). The court "discern[ed] a strong intent" that it is "not enforceable through a private cause of action." *Id.* at 16. The court noted that all three documents constituting the Berlin Accords identify as a clear purpose that "German companies receive 'all-embracing and enduring legal peace.' " *Id.* (citing Executive Agreement, pmbl. ¶ 10 & arts. 2(1), 2(2), 3(1); Joint Statement, pmbl. ¶¶ 13, 4(b); Foundation Law, pmbl. [¶ 7]). The court also noted a number of other "textual clues" indicating a lack of private enforceability, including the Joint Statement's title, the use of the term "participants" rather than "parties," and the use of the term "declare" rather than "agree" or "undertake." *Id.*

The court of appeals rejected as "textual hairsplitting" petitioners' argument, renewed in this Court, that Joint Statement sentences containing "will" were nonbinding, while statements containing "shall" created private rights of action in U.S. courts. The court found that "the distinction is not borne out in the Joint Statement's text." Pet. App. 17-18. (The court might have added that the verb in the very sentence at issue, the last sentence of Paragraph 4(d), is not "shall" but "will," requiring petitioners to forge still another ad hoc theory. *See* Pet. 24.) The court also rejected petitioners' attempts to sever the "interest" sentence in Paragraph 4(d) of the Joint Statement from the rest of the document:

> In this case, the Joint Statement's language does not lend itself to the dichotomous approach urged by Appellants. Excision of a single sentence from the body of the Joint Statement, and from the entire Berlin Accords, invites departure from the participants' intentions.

Pet. App. 19.

The court of appeals flatly rejected petitioners' assertion that it would have been "an act of temporary insanity" for petitioners' counsel to have agreed to dismiss the suits for redress if the Joint Statement were not judicially enforceable. Pet. App. at 19. The court found that the participants agreed on a judicially unenforceable document because the Joint Statement "had the support and backing of the governments of both the United States and the Federal Republic of Germany." *Id.* at 19-20. Reliance on governmental and intergovernmental remedies was consistent with the half-century of diplomacy that the Berlin Accords expressly

state they culminate. *Id.* at 235. It also found that petitioners' assertion ran "counter to the undisputed fact that [petitioners] always retained the option to reopen litigation through Federal Rule of Civil Procedure 60(B)," concluding that:

> given the Foundation's procedure and the option under Rule 60(b), the participants to the Joint Statement exhibited, through the text and structure of the Berlin Accords, an intent not to legally bind other participants by a contractual right enforceable through U.S. litigation.

Id. at 20-21.

"[C]ognizant of the drafting environment," the court rejected Petitioners' unsupported assertion that the Joint Statement was intended to serve as a Fed. R. Civ. P. 23 settlement agreement. Pet. App. 21. Indeed, it concluded that "[i]f the contextual evidence does anything, it strengthens our belief that the participants to the Joint Statement did not contemplate an agreement which would require further legal wrangling in courts." *Id.*

The court of appeals also rejected as "misleading" petitioners' claim that "*Medellín* does away with any presumption against self-execution of treaties." Pet. App. 22. It said, "The Supreme Court recognized that, '[e]ven when treaties are self executing in the sense that they create federal law, the background presumption is that [i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action.'" *Id.* at 23 (quoting *Medellín* v. *Texas*, 128 S. Ct. 1346, 1357 n.3 (2008)) (internal quotation marks omitted; alterations in original). Further, it is "the accepted

approach that, when no privately enforceable right is explicitly stated, 'courts look to the treaty as a whole to determine whether it evidences an intent to provide a private right of action.'" *Id.* at 24 (quoting *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring)).

Having found that the Joint Statement created no private right of action in a U.S. court, the court of appeals did not reach the second ground for dismissal decided by the district court, that defendants had fulfilled all payment commitments to the Foundation.

ARGUMENT

The courts below decided an issue that is unlikely to arise again in any U.S. forum, and they did so based on the specific words and uncommon circumstances of a unique set of documents, the Berlin Accords. The court of appeals' decision does not resolve any issue of federal law and does not conflict with any decision of this Court or any other court of appeals. Moreover, although the ultimate origins of this case lie in tragic events, the issues resolved below lack broad legal importance. The enforceability issue was correctly resolved below, and the result reached—dismissal of petitioners' claims—would also be required on an independent ground fully analyzed by the district court and not reached by the court of appeals. The case presents no question warranting this Court's review.

I. THE DECISION BELOW DOES NOT CONFLICT WITH *AMERICAN INSURANCE ASS'N* V. *GARAMENDI* OR ANY OTHER DECISION OF THIS COURT OR ANY COURT OF APPEALS

Petitioners' contention that the decision below conflicts with *American Insurance Ass'n* v. *Garamendi*,

539 U.S. 396 (2003), is, to be charitable, baseless. Nothing in *Garamendi* suggests that the Joint Statement created rights enforceable in a U.S. court. Indeed, *Garamendi* does not so much as mention the Joint Statement, by name or otherwise, except in a footnote stating that it "accompanied" the Executive Agreement and "recogniz[ed] that it would be in the participants' interests for the [German] Foundation to be the exclusive remedy and forum" for certain claims. *Id.* at 406 n.2 (internal quotation marks omitted).

Petitioners' assertion (Pet. 19) that "this Court enforced [the Berlin Accords] in *Garamendi*" is wrong. *Garamendi* involved a challenge to the California Holocaust Victim Insurance Relief Act ("HVIRA"), which required California insurance companies to disclose certain information about policies issued by German affiliates between 1920 and 1945. This Court stated that the issue was "whether HVIRA interferes with the National Government's conduct of foreign relations." 539 U.S. at 401. The respondents in that case[5]—and the United States—contended that HVIRA impermissibly interfered with the federal government's conduct of foreign affairs. This Court agreed, holding that HVIRA must "give way" to the "exercise of the federal executive authority" in the Executive Agreement with Germany and "the consistent Presidential foreign policy ... to encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions." *Id.* at 421. The Court thus required California to yield to presidential *handling* of the problem; nothing in its decision sug-

---

[5] No *Garamendi* respondent (or petitioner) is a party to these proceedings.

gests that it was "enforcing" the Berlin Accords (let alone the barely mentioned Joint Statement) against California; and nothing depended on whether the President had chosen to enter into an "enforceable" or an "unenforceable" Joint Statement.[6]

Petitioners do not assert that the decision below conflicts with any other decision of this Court, or any decision of any court of appeals. They do assert conflicts with two district court decisions, *Frumkin* v. *J.A. Jones, Inc. (In re Nazi Era Cases Against German Defendants Litig.)*, 129 F. Supp. 2d 370 (D.N.J. 2001); and *Winters* v. *Assicurazioni Generali S.p.A.*, Nos. 98 Civ. 9186, 97 Civ. 2262, 2000 U.S. Dist. LEXIS 18193 (S.D.N.Y Dec. 19, 2000), but the record in those cases unequivocally belies those assertions. *Frumkin* dismissed compensation claims for Nazi-era slave labor as posing constitutionally nonjusticiable political questions, not on the ground that the Joint Statement was enforceable as a private contract. *See* 129 F. Supp. 2d at 383-384. The court in *Frumkin* stated explicitly that "[t]he German Foundation does not form the basis for this dismissal; the political question doctrine and considerations of international comity do." *Id.* at 389. In other words, "[t]he question is not whether plaintiff's claims are barred by treaty, but whether his

---

[6] Four Justices dissented, in an opinion by Justice Ginsburg, arguing that "no executive agreement or other formal expression of foreign policy disapproves state disclosure laws like the HVIRA" and that California should not be required to yield on the point absent a "clear statement" from the federal executive. 539 U.S. at 430. Thus for the dissenters as well as the majority, the case turned on the relationship between federal Executive Branch and state policies, not on any question of contractual "enforce[ment]" of the Berlin Accords.

claims are such that they have been committed to the political branches for resolution." *Id.* at 378. In *Winters*, Judge Mukasey held that certain Swiss insurance companies were not covered by the Berlin Accords at all. He made a casual and inaccurate aside that the Berlin Accords "constitute, collectively, a settlement agreement," 2000 U.S. Dist. Lexis 18193, at *3, but he made no determination whether the Joint Statement is enforceable in a U.S. court, and nothing in his opinion suggests he thought anything turned on any such question.

II. PETITIONERS' VARIOUS ARGUMENTS ON THE MERITS OF THE ENFORCEABILITY ISSUE FURTHER ILLUSTRATE WHY THE CASE DOES NOT WARRANT REVIEW

Petitioners make several arguments that go to the merits of the enforceability issue. Each is wrong, and together they further illustrate why the intensely fact-specific decision below does not warrant this Court's review.

1. Petitioners assert that the Joint Statement is a "classic unilateral contract" (Pet. 22) (in some contrast with several assertions by the same counsel at earlier stages quite emphatically calling it a "classic bilateral contract." Pet. App. 66; *see also* CAJA 403, 1397. (Neuborne Decl. ¶ 52; transcript of May 25, 2004 oral argument)). But neither of the courts below—after scrutinizing the text of and unique circumstances surrounding the Joint Statement—was able to identify a single word suggesting that it is any sort of contract.

2. Petitioners attempt to find textual support for their unilateral contract theory based on how the Joint Statement uses the words "will" and "shall," claiming that the document subtly uses "will" to identify the un-

enforceable shared intentions and "shall" to identify the obligations that may become privately enforceable.[7]

The court of appeals rejected this contention after determining that in fact the document uses the words "interchangeably." Pet. App. 18. Moreover, petitioners face the embarrassment that the very sentence they claim gives rise to the "contractual" interest obligation they ask the courts to enforce, the last sentence in Paragraph 4(d), uses "will" three times, never "shall." They seek to solve this with an argument first made in this Court that there is a distinction between a

---

[7] Petitioners misquote a U.S. State Department official who participated in the negotiation of the Berlin Accords, Ronald J. Bettauer, in support of this contention. In fact, Mr. Bettauer's unabridged statement only "support[s] the view of [GEFI] that the Joint Statement is a political document." *Gross II*, 456 F.3d at 385. Mr. Bettauer stated:

> As the negotiations came to a conclusion, we needed a document indicating what further steps it was agreed each participant would take. It would not have been appropriate to have an international agreement between individual lawyers, private companies, an NGO and sovereign states. *We therefore developed a document that set forth political rather than legal commitments*—that is, undertakings that various participants "will" take various steps, rather than legal commitments that they "shall" do so. At this phase, we were once again involved in a negotiation with all the participants on the text of what became the "joint statement." This document set forth the undertakings of each party as to the steps it would take. This final aspect of the arrangement was more akin to a resolution that an international organization adopts. But this was not a negotiation in an international organization.

Bettauer, *Keynote Address—The Role of the United States Government in Recent Holocaust Claims Resolution*, 20 Berkeley J. Int'l L. 1, 9 (2002) (emphasis added).

"declarative usage" and a "descriptive usage" (Pet. 24), but their argument depends, at the very least, on the sentence being "declarative," which places them on the wrong side of the divide. There is no reason for this Court to be the third court to consider this factual question concerning the intention of the parties.

3. Petitioners assert that international agreements with "domestic effect" may be "self-executing," citing *Medellín* v. *Texas*, 128 S. Ct. 1346 (2008), and a string of other cases. But, first, this ignores the fact that the issue below was whether the Joint Statement was an "agreement," rather than a "joint statement" of its participants' intentions understood not to be enforceable against anyone. And, second, it ignores this Court's recognition in *Medellín* "that, '[e]ven when treaties are self-executing in the sense that they create federal law, the background presumption is that [i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.' " Pet. App. 23 (quoting *Medellín*, 128 S. Ct. at 1357 n.3 (internal quotation marks omitted; alterations in original).[8] Furthermore, the decisions below do

---

[8] Petitioners cite 12 Supreme Court decisions. Six concerned formal treaties expressly stating that they were self-executing. *See Bacardi Corp. of Am.* v. *Domenech*, 311 U.S. 150, 159 (1940) (General Inter-American Convention for Trade Mark and Commercial Protection (1929), Article 35); *Medellín*, 128 S. Ct. at 1365-1366 (citing the following cases as concerning explicitly self-executing treaties: *Clark* v. *Allen*, 331 U.S. 503 (1947); *Kolovrat* v. *Oregon*, 366 U.S. 187 (1961); *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176 (1982)); *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (construing the Warsaw Convention, which "is a self-executing treaty"); *Olympic Airways* v. *Husain*, 540 U.S. 644 (2004) (same). Four others concerned only

not rest on generally applicable rules of treaty construction, but on the singular text and circumstances of the Joint Statement.

4. Finally, petitioners assert that there is an "estoppel" because both petitioners and courts dismissed their prior cases for redress in reliance on "respondents' repeated promises that they would comply with the financial bargain" assertedly made in the Joint Statement. Pet. 27. Passing the fundamental point that this argument identifies no remotely certiorari-worthy question, it has two gaping holes.

First, the issue in this case, as both courts below understood it, is whether the Joint Statement is a contract enforceable in U.S. courts or is, rather, a "political document" expressing the participants' intentions but "reli[ant] on the power and persuasiveness of the United States and German Governments to ensure that ... [it] would be adhered to." Pet. App. 170. If, as both courts below concluded, the Joint Statement was the latter, then, as both courts also concluded, it plainly was not *turned into* an enforceable contract merely be-

---

preemption of state or municipal law by treaty obligations, not private enforceability. *See Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199, 235 (1796); *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 352 (1816); *De Geofroy* v. *Riggs*, 133 U.S. 258, 266 (1890); *Asakura* v. *City of Seattle*, 265 U.S. 332, 341 (1924). The treaty at issue in *Maiorano* v. *Baltimore & Ohio R.R. Co.*, 213 U.S. 268, (1909), expressly granted individuals a private right of action in U.S. courts. *Id.* at 273-274. The twelfth case, *Société Nationale Industriale Aérospatiale* v. *United States District Court*, 482 U.S. 522 (1987), did not deal with private economic relationships at all, but held that the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555 (1970), "was intended to establish optional procedures [in U.S. courts] that would facilitate the taking of evidence abroad." *Id.* at 537.

cause participants later acted in accordance with their stated intentions, or because respondents' counsel later said truthfully that respondents would do so. In any event, this theory rests on the law of contract, probably that of the Federal Republic of Germany, or less likely that of a state of the United States, and does not present a federal question for this Court.

Second, what petitioners in fact sought as a remedy for any shortfall in Foundation funding was the right to move to reopen their cases under Federal Rule 60(b), which Judge Bassler explicitly confirmed at their request in the dismissal orders. If plaintiffs had enforceable contractual rights, there would have been no reason for them to insist on preserving the inferior right to move to vacate the dismissals under Rule 60(b). Moreover, Judge Bassler specifically rejected petitioners' contention that GEFI "induced this and other American courts to dismiss the relevant actions based on misrepresentations concerning its interest obligations." *Gross I*, 320 F. Supp. 2d at 248.

III. Denial Of The Petition Will Work No Injustice

Finally, petitioners argue (Pet. 30-34) that if they were allowed to prove their interest claim on the merits they could show that Paragraph 4(d) of the Joint Statement "impos[ed] an interest obligation (at the 4% statutory default rate), on respondents' unpaid principal balance during the ... deferral period [beginning at signing on July 17, 2000 and continuing for the time] needed to secure dismissal of the pending U.S. cases." Pet. 31. In a stratospheric flight of rhetoric, they assert that the lower courts' supposed refusal to let them prove this is a challenge to the "rule of law."

There was no error, there is no injustice, and the "rule of law" is not at risk. Judge Debevoise, after re-

ceiving and hearing argument on *petitioners'* motion for summary judgment on this theory (attaching extensive evidentiary material that included Mr. Eizenstat's declaration incorporating his book (Pet. App. 255-257)), ruled that the record "demolish[ed]" the theory (*id.* at 205), and noted for good measure that Mr. Eizenstat's "book is totally consistent with Defendants' view of the case." *Id.* at 200.

The merits of the interest issue are not before the Court: petitioners concede that "it is unlikely that this Court would wish to consider those issues at this time." Pet. 30. But an examination of the sentence in question (Pet. App. 229 (last sentence of Paragraph 4(d)), will reveal that it is wholly unlike the kind of interest rate provision petitioners are fabricating, and an examination of Mr. Eizenstat's declaration will reveal that he has in no sense endorsed petitioners' theory that there was such a provision implicit in the very different words of the Joint Statement. To quote the district court:

> [Respondents'] undisputed Declarations and the vast amount of documentary evidence support [respondents'] account of what the German companies owe by way of interest and demolish the scenario that, with considerable ingenuity, [petitioners] have created.

Pet. App. 205.

The Court may deny certiorari without fear that an injustice is being done.

IV. CERTIORARI SHOULD BE DENIED IN *SCHWARTZ LEE*

To the extent petitioners seek *certiorari* also with respect to the *Schwartz Lee* case, their petition has even less merit. The *Schwartz Lee* claim does not rely

on the Joint Statement but an alleged oral agreement supposedly reached in December 1999. The District Court correctly determined that there was no oral agreement reached in December 1999, relying, in part, on a "highly relevant" letter from German Chancellor Schroeder (Pet. App. 105) that plaintiffs' counsel, in an incident that Judge Debevoise could only call "extraordinary" (*id.*), sought "to conceal or camouflage." *Id.* at 131 n.6. Judge Debevoise correctly found that this alleged agreement "defie[d] everything in the record" (*id.* at 211) and that the fact that Mr. Eizenstat "could have confirmed" its existence, but did not, "speaks volumes." *Id.* Agreeing with Judge Debevoise, the court of appeals thus concluded that, "even if [it] were to vacate the district court's dismissal of the *Schwartz Lee* complaint" because, as petitioners wrongly assert, the Joint Statement in fact was privately enforceable, "the only logical outcome after remanding would be dismissal." *Id.* at 28.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

LOUIS R. COHEN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

ROGER M. WITTEN
Counsel of Record
MATTHEW E. DRAPER
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Avenue
New York, NY 10022
(212) 230-8800

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

APRIL 6, 2009

APPENDIX

APPENDIX

The Law on the Creation of a Foundation "Remembrance, Responsibility and Future"

Preamble

Recognizing

that the National Socialist State inflicted severe injustice on slave laborers and forced laborers, through deportation, internment, exploitation which in some cases extended to destruction through labor, and through a large number of other human rights violations,

that German enterprises which participated in the National Socialist injustice bear a historic responsibility and must accept it,

that the enterprises which have come together in the Foundation Initiative of German Industry have acknowledged this responsibility,

that the injustice committed and the human suffering it caused cannot be truly compensated by financial payments,

that the Law comes too late for those who lost their lives as victims of the National Socialist régime or have died in the meantime,

the German Bundestag acknowledges political and moral responsibility for the victims of National Socialism. The Bundestag intends to keep alive the memory of the injustice inflicted on the victims for coming generations as well.

The German Bundestag presumes that this Law, the German-U.S. intergovernmental agreement, the accompanying statements of the U.S. Government as well as the Joint Declaration by all parties to the negotiations provide adequate legal security for German enterprises and the Federal Republic of Germany, especially in the United States of America.

With the concurrence of the Bundesrat, the Bundestag has passed the following Law:

Section 1: Establishment and Headquarters

(1) A legally recognized foundation with the name "Remembrance, Responsibility and Future" shall be established under public law. The Foundation comes into being as of the entry into force of this legislation.

(2) The headquarters of the Foundation shall be in Berlin.

Section 2: Purpose of the Foundation

(1) The purpose of the Foundation is to make financial compensation available through partner organizations to former forced laborers and to those affected by other injustices from the National Socialist period.

(2) A "Remembrance and Future" fund will be established within the Foundation. Its continuing task is to use the income produced by the means provided to the Foundation to foster projects that serve the purposes of better understanding among peoples, the interests of survivors of the National Socialist régime, youth exchange, social justice, remembrance of the threat posed by totalitarian systems

and despotism, and international cooperation in humanitarian endeavors. In commemoration and respect of those victims of National Socialist injustice who did not survive, it is also intended to further projects in the interest of their heirs.

Section 3: Donors and the Foundation's Capital Assets

(1) Contributors to the Foundation's capital fund shall be the companies joined together in the Foundation Initiative of German Industry, and the Federal Government.

(2) The Foundation shall be endowed with a capital fund consisting of the following:

1. Five billion deutschmarks that the companies joined together in the Foundation Initiative of German industry have agreed to make available, including the payments that German insurance companies have provided to the International Commission on Holocaust Era Insurance Claims or will provide in the future.

2. Five billion deutschmarks that the German Federal Government is making available in the year 2000. The contribution of the Federal Government includes the contributions of enterprises of which the Federal Government is sole owner or in which it has a majority interest.

(3) There is no obligation for the donors to make supplementary payments.

(4) The Foundation is authorized to accept contributions from third parties. It shall endeavor to obtain

additional contributions. The contributions are exempt from inheritance tax and gift tax.

(5) Income from the Foundation's capital fund and other income is to be used only for the purposes of the Foundation.

Section 4: The Bodies of the Foundation

The bodies of the Foundation are:

(1) the Board of Trustees.

(2) the Board of Directors.

Section 5: The Board of Trustees

(1) The Board of Trustees is made up of 27 members, namely:

1. the chairman, to be named by the German Chancellor;
2. four members to be named by the companies joined together in the Foundation Initiative of German Industry;
3. five members to be named by the German Bundestag and two by the Bundesrat;
4. one representative of the Federal Ministry of Finance;
5. one representative of the Ministry of Foreign Affairs;
6. one member to be named by the Conference on Jewish Material Claims against Germany;
7. one member to be named by the Central Council of German Sinti and Roma, the Alliance of

German Sinti, and the International Romani Union;

8. one member to be named by the Government of the State of Israel;

9. one member to be named by the Government of the United States of America;

10. one member to be named by the Government of the Republic of Poland;

11. one member to be named by the Government of the Russian Federation;

12. one member to be named by the Government of Ukraine;

13. one member to be named by the Government of the Republic of Belarus;

14. one member to be named by the Government of the Czech Republic;

15. one lawyer to be named by the Government of the United States of America;

16. one member to be named by the United Nations High Commissioner for Refugees (UNHCR);

17. one member to be named by the International Organization for Migration (IOM) in accordance with Section 9, Paragraph 2, Number 6; and

18. one member to be named by the Federal Information and Counseling Association for Victims of National Socialism e. V. [Registered Association].

The sending body may designate a substitute for each member of the Board [which it names].

A different composition of the Board of Trustees may be decided by a unanimous decision of the Board of Trustees.

(2) The term of office for members of the Board of Trustees shall be four years. If a member should resign before the end of his term, a successor may be appointed for the remainder of the term. The members of the Board of Trustees can be recalled by the sending body at any time.

(3) The Board of Trustees shall establish its own rules of procedure.

(4) The presence of half the membership of the Board of Trustees plus one shall constitute a quorum. The board shall make decisions on the basis of a simple majority. In case of a tie, the vote of the chairman shall determine the outcome.

(5) The Board of Trustees has the right to decide on all fundamental matters that have to do with the tasks of the Foundation, specifically with regard to budgetary plans, the annual report, and the existence of the specific characteristics referred to in Section 12, Paragraph 1. It monitors the performance of the Board of Directors.

(6) The Board of Trustees makes decisions regarding the projects of the "Remembrance and Future" Fund based on proposals by the Board of Directors.

(7) The Board of Trustees establishes guidelines for the use of resources insofar as their use is not already specified in this Law. In this connection, it

shall particularly endeavor to see to it that the partner organizations are able to draw in fair shares upon the eligibilities for payment referred to in Section 11, Paragraph 1, Sentence 1, Numbers 1 and 2.

(8) Members of the Board of Trustees serve in a "pro bono" capacity; necessary expenses will be reimbursed.

Section 6: The Board of Directors of the Foundation

(1) The Board of Directors shall consist of the chairman and two additional members. Members of the Board of Trustees may not at the same time belong to the Board of Directors.

(2) The members of the Board of Directors will be named by the Board of Trustees.

(3) The Board of Directors shall direct the day-to-day business of the Foundation and shall implement the decisions of the Board of Trustees. It is responsible for distributing the resources of the Foundation to the partner organizations and for the management of the "Remembrance and Future" fund. It oversees the purposeful and prudent expenditure of the Foundation's funds, in particular adherence by the partner organizations to the provisions of this Law and the guidelines established by the Board of Trustees for the use of its funds. The Board of Directors shall represent the Foundation, both in judicial and extrajudicial matters.

(4) The details shall be determined by the by-laws.

Section 7: The By-laws

The Board of Trustees shall adopt a set of by-laws by a two-thirds majority vote. If a set of by-laws has still not been adopted within three months of the initial meeting of the Board of Trustees, the chairman shall propose a set of by-laws that will be passed by a simple majority. The Board of Trustees may amend the by-laws on the basis of a two-thirds majority.

Section 8: Oversight, Budget, Auditing

(1) The Foundation is subject to legal oversight by the Federal Ministry of Finance; starting with the second period in office of the Board of Trustees, it shall be subject to legal oversight by the Ministry of Foreign Affairs.

(2) The Foundation shall prepare a budget in timely fashion before the start of each fiscal year. The budget shall require the approval of the Federal Ministry of Finance.

(3) The Foundation shall be subject to being audited by the Federal Court of Audit. Without prejudice hereto, the Foundation's accounts and the management of its budget and finances are to be audited by the Federal Office for the Settlement of Open Property Matters.

Section 9: Use of Foundation Resources

(1) Resources of the Foundation that serve the purpose of the Foundation referred to in Section 2, Paragraph 1, will be allocated to partner organizations. They are to be used for one-time payments to persons eligible pursuant to Section 11, as well as for covering the personnel and non-personnel expenses

of the partner organizations. Persons eligible under Section 11, Paragraph 1, Sentence 1, Number 1 or Sentence 5 can receive up to 15,000 deutschmarks, and persons eligible under Section 11, Paragraph 1, Sentence 1, Number 2, or Sentence 2 can receive up to 5,000 deutschmarks. Receiving a payment under Section 11, Paragraph 1, Sentence 1, Number 1 or 2 does not preclude receiving a payment under Section 11, Paragraph 1, Sentence 1, Number 3 or Sentence 4 or 5.

(2) The partner organizations shall have available 8.1 billion deutschmarks including 50 million deutschmarks in accrued interest for payments to persons who suffered personal damage as referred to in Section 11, Paragraph 1, Sentence 1, Numbers 1 and 2, and Section 11, Paragraph 1, Sentence 2, insofar as [the payments are] intended for compensation for forced labor. The total amounts shall be divided into the following maximum amounts:

1. for the partner organization responsible for the Republic of Poland, 1,812 million deutschmarks;

2. for the partner organization responsible for Ukraine and the Republic of Moldova, 1,724 million deutschmarks;

3. for the partner organization responsible for the Russian Federation and the Republic of Latvia and the Republic of Lithuania, 835 million deutschmarks;

4. for the partner organization responsible for the Republic of Belarus and the Republic of Estonia, 694 million deutschmarks;

5. for the partner organization responsible for the Czech Republic, 423 million deutschmarks;

6. for the partner organization responsible for the non-Jewish claimants outside the states referred to in Numbers 1 through 5 (the International Organization for Migration), 800 million deutschmarks; the partner organization must pay over up to 260 million deutschmarks of this amount to the Conference on Jewish Material Claims against Germany;

7. for the partner organization responsible for the Jewish claimants outside the states referred to in Numbers 1 through 5 (the Conference on Jewish Material Claims against Germany), 1,812 million deutschmarks.

The partner organizations must use these monies to make the stipulated payments for all persons who on February 16, 1999, had their principal domicile in their [the organizations'] individual regional areas of responsibility and on that date belonged to their material sphere of responsibility. The partner organizations referred to in Numbers 2, 3, and 4 are also responsible for those persons who on February 16, 1999, had their principal domicile in other states, which were republics of the former USSR; in each case that partner organization is responsible from whose area the claimant was deported.

(3) 50 million deutschmarks are intended for compensation of other personal injuries in connection with National Socialist injustice. Claims are to be addressed to the partner organizations referred to in Paragraph 2. These organizations shall determine the merits and amount of the damage claimed. The

amount of the compensation payments shall be determined by the Commission referred to in Paragraph 6, Sentence 2, in accordance with the ratio between the totality of the damages recognized by the partner organizations and the total amount of the monies referred to in Sentence 1, with due consideration given to Section 11, Paragraph 1, Sentence 5. The partner organizations may request the Commission referred to in Sentence 4 to assign the determinations referred to in Sentence 3 to an independent arbitrator. A partner organization that prefers not to make the determinations referred to in Sentence 3 itself must bear the costs of the arbitrator.

(4) The sum of one billion deutschmarks of the Foundation's monies is intended for payments to persons who suffered property loss. This amount is divided into the following maximum amounts:

1. 150 million deutschmarks for property losses resulting from persecution within the meaning of Section 11, Paragraph 1, Sentence 1, Number 3;

2. 50 million deutschmarks for other property losses within the meaning of Section 11, Paragraph 1, Sentence 4;

3. 150 million deutschmarks for the International Commission on Holocaust Era Insurance Claims to compensate unpaid or revoked and not otherwise compensated insurance policies of German insurance enterprises, including the costs incurred in this connection;

4. 300 million deutschmarks for social purposes to the benefit of Holocaust survivors through the Conference on Jewish Material Claims against Germany; 24 million deutschmarks of this shall be paid over to the partner organization referred to in Paragraph 2, Number 6, which shall use it for social purposes vis-à-vis the similarly persecuted Sinti and Roma;

5. 350 million deutschmarks for the humanitarian fund of the International Commission on Holocaust Era Insurance Claims.

(5) If additional interest is earned from the monies made available to the Foundation except for the monies intended for the Future Fund, up to 50 million deutschmarks of this shall be made available to the International Commission on Holocaust Era Insurance Claims to compensate insurance losses within the meaning of Paragraph 4, Sentence 2, Number 3, for foreign subsidiaries of German insurance enterprises and for costs incurred in this connection, as soon as the monies are available. Monies referred to in Sentence 1 and Paragraph 4, Sentence 2, Number 3, may also be used for the other purpose in each case.

(6) Claims for payments from the monies envisaged in Paragraph 4, Sentence 2, Numbers 1 and 2, are to be addressed to the partner organization referred to in Paragraph 2, Number 6, regardless of the claimant's residence. Determinations concerning these payments shall be made by a commission to be formed under this partner organization. The commission shall consist of one member each to be named by the Federal Ministry of Finance and the Department of State of the United States of Amer-

ica and a chairperson to be chosen by those two members. The commission shall establish supplemental principles concerning the content and procedure of its determinations, insofar as these are not already established under this Law or the bylaws. The commission shall rule on the submitted applications within a year after expiration of the application deadline. Sentences 3 and 4 apply, *mutatis mutandis*, to the appeals organ to be established in accordance with Section 19. The costs of the commission, the appeals organ, and the partner organization are to be covered pro rata from the total amount referred to in Paragraph 4, Sentence 2, Numbers 1 and 2. If the amount of damages recognized by the commission exceeds the monies available under Paragraph 4, Sentence 2, Number 1 or 2, the payments to be made are to be reduced in proportion to the available monies.

(7) 700 million deutschmarks including the interest accruing thereto are to be used for projects of the "Remembrance and Future" Fund. Of this amount, 100 million deutschmarks may be made available for other than its intended purpose, if well-founded requests are filed based on insurance claims that could not be met under Paragraph 4, Sentence 2, Number 3, and Paragraph 5.

(8) In concert with the Board of Trustees, the partner organizations may subdivide the category of forced laborers, within its quota, in accordance with Section 11, Paragraph 1, Sentence 1, Number 1, insofar as this involves persons interned in other places of confinement, as well as affected persons within the meaning of Section 11, Paragraph 1, Sentence 1, Number 2, into subcategories depending on the se-

verity of their fate and may set correspondingly gradated maximum amounts. This shall also apply to the eligibility of legal successors.

(9) The maximum amounts under Paragraph 1 may only be paid out for the time being in the amount of 50% for claimants under Section 11, Paragraph 1, Sentence 1, Number 1, and 35% for claimants under Section 11, Paragraph 1, Sentence 1, Number 2 or Sentence 2. Another payment of up to 50% of the amounts mentioned in Paragraph 1 for claimants under Section 11, Paragraph 1, Sentence 1, Number 1 and up to 65% of the amounts mentioned in Paragraph 1 for claimants under Section 11, Paragraph 1, Sentence 1, Number 2 or Sentence 2 shall be paid out after conclusion of the processing of all applications pending before the respective partner organization, to the extent possible within the framework of the available means. The partner organizations may set up a financial reserve for appeals under Section 19, in the amount of up to 5% of the monies allocated. To the extent the reserve has been set up, payment of the second installment under Sentence 2 may be made before the conclusion of the appeal proceedings. The Board of Trustees has the right, at the request of individual partner organizations, to allow an increase in the installment payments laid down under Sentence 1, insofar as it is assured that the monies allocated in Paragraph 2 are not exceeded.

(10) Payments under Section 11, Paragraph 1, Sentence 1, Number 3, with the exception of the payments of the International Commission on Holocaust Era Insurance Claims and payments under Section 11, Paragraph 1, Sentence 4 or 5 can take place only af-

ter all applications pending before the competent commission have been processed.

(11) Monies allocated under Paragraph 2 but not completely depleted are to be used for persons entitled to payments under Section 11, Paragraph 1, Sentence 1, Numbers 1 and 2. Should the funds provided under Paragraphs 2 and 3 not be completely depleted in spite of payment of the maximum amounts under Paragraph 1, Sentence 3, the Board of Trustees shall decide how they shall be used. Just as in the case of the use of additional monies, the Board must compensate, in particular, any shortage incurred by individual partner organizations in making payments under Section 11, Paragraph 1, Sentence 1, Numbers 1 and 2. Monies referred to in Paragraph 4, Sentence 2, Numbers 1 and 2, which are not drawn down despite full compensation of damages shall go to the Conference on Jewish Material Claims against Germany; those referred to in Paragraph 4, Sentence 2, Number 3, to the International Commission on Holocaust Era Insurance Claims. The Board of Trustees may allow the maximum amounts under Paragraph 1, Sentence 3 to be exceeded if all partner organizations have been able to make payments in the amounts of these maximum amounts.

(12) Personnel and non-personnel costs shall be paid from the Foundation's funds, insofar as they are not to be assumed by the partner organizations in accordance with Paragraph 1, Sentence 2. The costs to be borne by the Foundation also include outlays for attorneys and counsel whose activity on behalf of persons entitled to payments under Section 11 contributed to the establishment of the Foundation

or otherwise were favorable to its creation, particularly by taking part in the multilateral negotiations that preceded the establishment of the Foundation or by filing complaints on behalf of claimants under Section 11 between November 14, 1990, and December 17, 1999. There is no legal claim to payments pursuant to Sentence 2. An arbitrator named by the Foundation will determine the allocation of an amount set by the Board of Trustees, based on guidelines that shall be determined and published by the Board of Trustees. Requests for the payments stipulated in Sentence 2 are to be submitted to the Foundation by the attorneys and counsel themselves and on their own behalf within eight months after publication of the guidelines. They must be accompanied by documentation of the outlays claimed. Every attorney and counsel shall make a declaration in the request proceedings to the effect that he waives any claims against his clients upon receipt of a payment under Sentence 2. He is under obligation to advise his clients that he has waived any claims.

(13) For pending litigation concerning matters covered in this Law, court costs shall not be levied.

Section 10: Distribution of Resources through Partner Organizations

(1) The approval and disbursal of one-time payments to those persons eligible under Section 11 will be carried out through partner organizations. The Foundation is neither authorized nor obligated in this regard. The Board of Trustees may decide for another mode of payment. The partner organizations shall cooperate with appropriate associations of persecutees and local organizations.

(2) Within two months after entry into force of the Law, the Foundation and its partner organizations are to publicize the possibility of compensation under this Law in an appropriate manner to all groups of eligible people in their respective countries of residency. These publications shall specifically include information about the Foundation and its partner organizations, the conditions on which compensation can be awarded, and application deadlines.

Section 11: Eligible Persons

(1) Eligible under this Law are:

1. persons who were held in a concentration camp as defined in Section 42, Paragraph 2 of the German Indemnification Act or in another place of confinement outside the territory of what is now the Republic of Austria or a ghetto under comparable conditions and were subjected to forced labor;

2. persons who were deported from their homelands into the territory of the German Reich within the borders of 1937 or to a German-occupied area, subjected to forced labor in a commercial enterprise or for public authorities there, and held under conditions other than those mentioned in Number 1, or were subjected to conditions resembling imprisonment or similar extremely harsh living conditions; this rule does not apply to persons who because their forced labor was performed primarily in the territory of what is now the Republic of Austria can receive payments from the Austrian Reconciliation Foundation;

3. persons who suffered property loss as a consequence of racial persecution with essential, direct, and harm-causing collaboration of German businesses as defined by the laws on indemnification and who could not receive any payment or could not file their claims for restitution or compensation by the deadline because they either did not meet the residency requirements of the Federal Indemnification Act or had their domicile or permanent residence in an area with whose government the Federal Republic of Germany did not maintain diplomatic relations, or because they could not prove that an asset that had been expropriated due to persecution outside the territory of the German Reich in its 1937 borders and could no longer be located there, had been removed to the Federal Republic of Germany, or the proofs of the validity of their claims under the Federal Restitution Act *[Bundesrückerstattungsgesetz]* and the Federal Indemnification Act *[Bundesentschädigungsgesetz]* became known and available only due to German reunification, and the filing of the claims under the Law on the Settlement of Open Property Matters or the Law on Indemnification of Victims of Nazism was not allowed, or to the extent that restitution payments for monetary claims expropriated outside Reich territory were denied for lack of the possibility of assessing them, and no payments could be claimed either under the Currency Conversion Act, the Federal Indemnification Act, the Equalization of Burdens Act, or the Reparation Losses Act; that also applies to other persecutees within the meaning of the

Federal Indemnification Act; special arrangements within the framework of the International Committee of Holocaust Era Claims shall remain unaffected.

The partner organizations may also award compensation from the funds provided to them pursuant to Section 9, Paragraph 2 to those victims of National Socialist crimes who are not members of one of the groups mentioned in Sentence 1, Numbers 1 and 2, particularly forced laborers in agriculture. These awards, with reservation as to Section 9, Paragraph 8, must not result in any reduction in the payments to persons eligible under Paragraph 1, Sentence 1, Number 1. The funds provided for in Section 9, Paragraph 4, Sentence 2, Number 2 are intended to compensate property damage inflicted during the National Socialist regime with the essential, direct, and harm-causing participation of German enterprises, but not inflicted for reasons of National Socialist persecution. The funds referred to in Section 9, Paragraph 3, shall be awarded in cases of medical experiments or in the event of the death of or severe damage to the health of a child lodged in a home for children of forced laborers; in cases of other personal injuries they may be awarded.

(2) Eligibility shall be demonstrated by the applicant by submission of documentation. The partner organization shall bring in relevant evidence. If no relevant evidence is available, the claimant's eligibility can be made credible in some other way.

(3) Eligibility cannot be based on prisoner-of-war status.

(4) Payments from the Foundation are exempt from inheritance tax and gift tax.

Section 12: Definitions

(1) Specific characteristics of other places of confinement referred to in Section 11, Paragraph 1, Number 1 are inhumane prison conditions, insufficient nutrition, and lack of medical care.

(2) German enterprises referred to in Sections 11 and 16 are those that had their headquarters within the 1937 borders of the German Reich or have their headquarters in the Federal Republic of Germany, as well as their parent companies, even when the latter had or have their headquarters abroad. Enterprises situated outside the 1937 borders of the German Reich in which during the period between January 30, 1933, and the entry into force of this Law, German enterprises as described in Sentence 1 had a direct or indirect financial participation of at least 25 percent are also considered German enterprises.

Section 13: Application Eligibility

(1) Awards under Section 11, Paragraph 1, Sentence 1, Numbers 1 or 2, or Sentence 2 or Sentence 5 are strictly personal and individual and must be applied for in one's own name. In a case where the eligible person has died after February 15, 1999, or where an award under Section 11, Paragraph 1, Number 3 or Sentence 4 is being applied for, the surviving spouse and children shall be entitled to equal shares of the award. If the eligible person left neither a spouse nor children, awards may be applied for in equal shares by the grandchildren, or if there are no

grandchildren living, by the siblings. If no application is filed by these persons, the heirs named in a will are entitled to apply. Special arrangements within the framework of the International Commission on Holocaust Era Insurance Claims shall remain unaffected. The claim to payment cannot be ceded or attached.

(2) Juridical persons shall not be eligible. They can file applications as representatives of their shareholders eligible under this Law if specifically authorized by these shareholders. If a religious community or organization suffered property losses with the essential, direct, and harm-causing participation of German enterprises, Sentence 1 does not apply to them or their legal successors.

Section 14: Cut-off Dates

(1) Eligibility pursuant to Section 11 can no longer be determined if an application has not been received by a partner organization by the end of 31 December 2001. This shall also apply if upon conclusion of processing by the respective partner organization within the meaning of Section 9, Paragraph 9, Sentence 2 the application forms, documentation and evidence required to take a decision on the application have not been received.

(2) Applications that are received directly by the Foundation or by an inappropriate partner organization shall be forwarded to the appropriate partner organization. Special arrangements within the framework of the International Commission on Holocaust Era Insurance Claims shall remain unaffected.

(3) If an application has been filed within the application period specified in Paragraph 1 and if within six months after the death of the eligible person none of the persons eligible as legal successors pursuant to Section 13, Paragraph 1, Sentences 2 through 4 have notified the partner organization of their legal succession, the eligibility for an award shall expire. Paragraph 2 shall apply to the notification of legal succession *mutatis mutandis*.

Section 15: Treatment of Other Payments

(1) Payments for injustices suffered under National Socialism are supposed to benefit the persons eligible and not lead to a reduction of income received from the social security or health care system.

(2) Payments made earlier by enterprises in compensation for forced labor and other National Socialist injustices, even if made through third parties, shall be counted against payments under Section 9, Paragraph 1. Special arrangements within the framework of the International Commission on Holocaust Era Insurance Claims shall remain unaffected.

Section 16: Exclusions from Claims

(1) Payments from public funds, including social security, and from German business enterprises for injustice suffered under National Socialism as defined in Section 11 may be claimed only under the terms of this Law. Any further claims in connection with National Socialist injustices are excluded. This applies also to cases in which claims have been transferred to third persons by operation of law, transition, or a legal transaction.

(2) Each claimant shall provide a statement within the framework of the application procedure irrevocably renouncing, without prejudice to Sentences 3 through 5, after receipt of a payment under this Law any further claim against the authorities for forced labor and property damage, all claims against German enterprises in connection with National Socialist injustice, and forced-labor claims against the Republic of Austria or Austrian enterprises. The renunciation becomes effective upon receipt of a payment under this Law. Accepting payments for personal damage under Section 11, Paragraph 1, Sentence 1, Number 1 or 2, or Sentence 2 or Sentence 5 shall not mean the renunciation of payments for insurance or other property damage in accordance with Section 11, Paragraph 1, Sentence 1, Number 3, or Sentence 4, and vice versa. Sentence 1 does not apply to claims arising from National Socialist injustice committed by foreign parent companies with headquarters outside the 1937 borders of the German Reich without having any connections with their German subsidiaries and the latter's involvement in National Socialist injustice. Sentence 1 also does not apply to any claims to restitution of artworks, insofar as the applicant undertakes to pursue this claim in Germany or the country from which the artwork was taken. The renunciation also pertains to compensation of legal costs for the prosecution of the claim, insofar as Section 9, Paragraph 12, does not provide otherwise. The details of the procedure shall be determined by the by-laws.

(3) More extensive compensation arrangements and settlements of the consequences of war at the public expense shall not be prejudiced by the above.

Section 17: Transfer of Funds

(1) The Foundation is to make funds available quarterly to the partner organizations according to their documented need as outlined in Section 9, Paragraphs 2 and 3. The utilization of funds will be appropriately monitored by the Foundation.

(2) The first allocation of funds to the Foundation requires as a precondition the entry into force of the German-American Intergovernmental Agreement Concerning the Foundation "Remembrance, Responsibility and Future," and the establishment of adequate legal security for German enterprises. The German Bundestag shall determine whether these preconditions exist.

Section 18: Requests for Information

(1) The Foundation and its partner organizations are authorized to receive information from agencies and other public bodies that is necessary for the fulfillment of their responsibilities. Information will not be provided if this would be contrary to specific official regulations on the use of the information, or when justifiable protection of the interests of the party concerned outweighs the general interest favoring disclosure.

(2) The information received may be used only for the purpose of carrying out the goals of the Foundation, and an applicant's personal data may be used only for the grant procedure under Section 11. The use of these data for other purposes is admissible only with the express consent of the applicant.

(3) Applicants under this Law may request information from enterprises in Germany for which or for whose

legal predecessors they performed forced labor, insofar as this is requisite for determining their eligibility for awards.

Section 19: Appeals Process

The partner organizations are to create appeals organs that are independent and subject to no outside instruction. The appeals process itself is to be free of charge. However, costs incurred by the applicant are not to be reimbursed.

Section 20: Entry into Force

This Law enters into force on the date after its promulgation.